



SIX RULES

- 1 Lay Opinion, 701
- 4 Expert Opinion, 702 705
- 1 Court Appointed Experts, 706

- Interplay with
- 602- First-hand knowledge & 701
- 403 & 403 Relevance & 701, 702
- 104- Preliminary Questions & 702, 703

OPINION TESTIMONY

- 1
 - Rationally based upon the perception of the witness AND
 - Helpful to a Clear Understanding AND
 - NOT based on scientific, technical, or other specialized knowledge within the Scope of Rule 702
 - LAY WITNESS

- If scientific, technical, or other specialized knowledge will <u>ASSIST</u> AND
- Witness qualified by knowledge, skill, experience, training, or education, AND
- the testimony
- (1) is based upon sufficient facts or data,
- (2) is the product of reliable principles and methods, and
- (3) witness has applied the principles and methods reliably to facts

EXPERT WITNESS

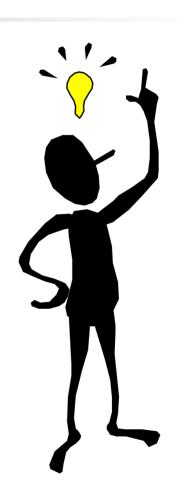


LAY WITNESS OPINION, 701

- Rationally Based on the Witness' Perception and
- Helpful to Clear Understanding of Testimony or Fact in Issue
- and not based on Scientific, Technical, or Specialized Knowledge

EXPERT OPINION

- Scientific, Technical, or Specialized Knowledge
- Assist the Trier of Fact
- And Qualified by Knowledge, Skill, Experience, Education, or Training
- AND



Daubert addition to FRE 702

- Or otherwise , if
- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to facts of the case.



 "Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rest are reliable."

ANALYSIS FOR EXPERT OPINIONS

- Is the expert sufficiently qualified by virtue of training, education, experience, or knowledge?
- will the opinion assist the trier of fact in understanding the evidence or determining a fact in issue?

702

CONT'D

- Is the testimony based upon sufficient facts or data?
- Is the testimony the product of reliable principles and methods?
- Has the witness applied the principles and methods reliability to the facts of the case?
- Daubert amendment to 702

BASES OF OPINION

- Facts of Data Perceived by expert at or before hearing or trial
- Facts or Data Made Known to expert at or before hearing or trial

- If underlying facts are reasonably relied upon by experts in the field, need not be admissible in evidence
- **703**

INADMISSIBLE FACTS OR DATA

- Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion unless the court determines that their probative value in assisting the jury in evaluating the evidence substantially outweighs their prejudicial effect.
- **703**

OPINION ON ULTIMATE SSUE

Does not make opinion objectionable

- BUT
- Witness may not testify as to opinion of mental state or condition of criminal defendant constituting an element of the crime or defense.
- **704**

DISCLOSURE OF UNDERLYING FACTS OR DATA

- Expert witness is not required to disclose facts or data underlying the opinion in advance of giving the opinion, unless the court so orders
- But may be required to disclose on cross-examination
- **705**



- 702 sets forth standards of admissibility of expert opinion
- 703 & 705 sets forth what expert can base opinion upon (bases of opinion), when the bases is admissible, and when the bases must or may be revealed
- 704 removes common law rule disallowing opinions on ultimate issue; sets forth special rule regarding mental state of defendant in criminal case

STANDARD FOR ADMITTING EXPERT TESTIMONY

Frye Doctrine – General Acceptance

Assist Standard

U.S. SUPREME COURT AND EXPERT TESTIMONY

Daubert – Scientific Validity,
 Assistance, and Admissibility

Joiner – Standard for appellate review

 Kumho Tire Co. Ltd. – Application to types of opinion evidence

DAUBERT

- Frye is not the standard under Rule 702
- Expert testimony must meet a standard of evidentiary reliability AND must assist
- Evidentiary reliability will be based upon scientific validity
- Assist standard requires valid scientific connection to pertinent inquiry
- Some theories beyond question

DAUBERT AND THE GATEKEEPER FUNCTION

- Trial Judge will determine admissibility based on validity and connectedness
- Validity may depend on test, peer review, publication, rate of error, acceptance
- Cross-examination; presentation of contrary evidence, and careful jury instructions on the burden of proof are appropriate means for attacking shady, but admissible evidence

JOINER

 Trial judge's decision to admit or exclude expert testimony will be judged on appeal by an abuse of discretion standard

 Decision need not be solely based on methodology and principles, but may consider conclusions

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- Gatekeeping function applies to all expert testimony, not just scientific testimony
 - Function is to assure testimony is preceded with same rigor as laboratory, field
 - Daubert factors should be considered where they are reasonable measures of reliability
 - Whether the factors are a reasonable measure of reliability is a matter for the trial judge's discretion